No. 3975

In the United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM FISHER, Supervising Inspector for the Eleventh District of Steamboat Inspection Service, Department of Commerce of the United States, and DONALD AMES and HARRY C. LORD, Local Inspectors Steamboat Inspection Service, Department of Commerce of the United States,

Appellants,

vs.

JOHN ALWEN,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge.*

BRIEF OF APPELLANTS

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STATEMENT OF CASE

This matter is before the court on an appeal from a decision rendered in the United States District Court for the Western District of Washington, Northern Dvision, on February 3, 1922, denying the jurisdiction of William Fisher as Supervising In-

spector for the Eleventh District of Steamboat Inspection Service, Department of Commerce of the United States, one of the appellants, to suspend the license of appellee as master and pilot.

The facts disclosed that the appellants Donald Ames and Harry C. Lord, acting as a Board of Local Inspectors of the Steamboat Inspection Service of the Department of Commerce of the United States, held an investigation as to the causes and responsibility for a collision that occurred on March 31, 1921, between the S. S. Governor and the S. S. West Hartland, which resulted in the sinking of the S. S. Governor and the loss of the lives of eight persons. The appellee, John Alwen, was the master of the S. S. West Hartland and in charge of her at the time of the collision.

On April 16, 1921, the appellants, Lord and Ames, sitting as the Board of Local Inspectors at Seattle, Washington, made their findings exonerating appellee from all blame and placing responsibility for the collision on certain officers of the S. S. Governor (Tr. pp. 63 and 142). The testimony of the Appellant Lord, who was called as a witness for the plaintiff, shows that the Board of Local Inspectors followed the usual procedure in investigations of that nature (Tr. p. 141). Its purpose was to determine

whether appellee was in part responsible for the collision or for any violation of the statutes with regard to navigation (Tr. p. 141). Appellant Lord testified that while he did not remember whether or not appellee appeared before the Local Board of Inspectors on a written request, that the appellee reported the collision to the office and it naturally followed that he was to appear as a witness and bring such witnesses as he knew had knowledge of the matter (Tr. p. 141). The appellee was given an opportunity to produce whatever witnesses he wanted to upon this hearing. The Local Board furnished the Appellant Fisher with a certified copy of the testimony given before it at the hearing (Tr. p. 140). The findings and decision of the Local Board were transmitted to the Appellant Fisher as Supervising Inspector on April 18, 1921 (Tr. p. 142). The Appellant William Fisher, who at the time was Supervising Inspector for the Eleventh District of the Steamboat Inspection Service of the Department of Commerce of the United States, testified that he *immediately* began a very thorough study of the findings and decision, reviewing them over a great many times as a whole and in detail, and continued his study, reading and analyzing the findings and decision for a period of about two

weeks, completing the same by the first or second of May (Tr. p. 143). Appellant Fisher further testified that his review of the testimony adduced before the Board of Local Inspectors convinced him that the decision exonerating appellee was not warranted by the testimony before the Local Board (Tr. p. 144). He said that nothing could be gained by returning the evidence to the Board or advising them of a contrary decision reached by him because they had already considered the matter and that, although, his review of the testimony convinced him that Captain Alwen was culpable in his management of the S. S. West Hartland, he decided to afford him an opportunity to testify in his own behalf, and in order to proceed in a definite way he decided to present the matter in the form of charges (Tr. p. 144). See Plaintiff's Exhibit "No. 1" for these charges (Tr. p. 159).

The Appellant Fisher further testified that a rough draft of the charges was prepared on May 14, 1921. He then decided to verify his understanding of the statutes in regard to his authority to prefer charges in addition to his review of the Local Board's decision and therefore wired to the Bureau of Investigation on May 14, 1921, but, owing to trouble with the telegraph wires throughout the

country at that time, did not receive a reply until the morning of May 16, 1921, when the bureau advised him that he had the authority to prefer the charges in addition to his review, and conduct a trial. He then had the charges typewritten and deposited in the Post Office at Seattle on May 16, 1921, at 5 o'clock P. M., addressed to the appellee, who then resided in that city (Tr. pp. 144 and 147).

In response to the charges so filed by Appellant Fisher, Captain Alwen appeared before him, the hearing commencing on about the 20th of May, 1921, and continuing for about a month when the taking of the testimony was completed and counsel for appellee requested that said appellant's decision be delayed in order that he might have time to file a brief. The long period of time covered by the hearing resulted from postponements from time to time, some of which were at the request of Appellant Fisher and some of which were at the request of counsel for appellee (Tr. p. 145).

At no time during the hearing by the Supervising Inspector was any objection raised by appellee or his counsel as to Appellant Fisher's right to proceed with the hearing until after all of the evidence directed against the appellee had been introduced, at which time, namely, July 21, 1921, counsel for

appellee moved to dismiss the proceedings. During this same hearing on June 24, 1921, Appellant Fisher notified appellee that the hearing was proceeding as a continuation of the review that he had previously undertaken of the decision of the Local Inspectors (Tr. p. 146). *The appellee himself testified that on the very first day of the hearing before the Appellant Fisher, he knew that Fisher was reviewing the decision of the Board of Local Inspectors* (Tr. p. 138).

On July 22, 1921, Appellant Fisher, as Supervising Inspector, filed his findings, conclusions and decision in which he held that the appellee was guilty of negligence, unskillfulness and inattention in his duties as master of the S. S. West Hartland on the night of March 31, and the morning of April 1, 1921, in connection with the collision between that vessel and the S. S. Governor, and suspended appellee's license as master and pilot for a period of two years from July 22, 1921 (Tr. p. 70 *et seq.*), whereupon appellee instituted this suit to prevent the carrying into effect of said decision of the Appellant Fisher as Supervising Inspector.

This cause came on for trial before the Honorable Jeremiah Neterer, Judge of the United States District Court in and for the Western District of Wash-

ington, Northern Division, sitting in equity, on the 10th day of January, 1922. After considering the testimony adduced by both parties at said trial, the court on February 3, 1922, rendered its decision denying jurisdiction of the Appellant Fisher to suspend appellee's license as master and pilot (Tr. p. 105) and thereafter on February 21, 1922, a decree was entered in this cause in said court adjudging appellant's said findings, decision and order as Supervising Inspector to be null and void (Tr. p. 113). It is from this decree that appellant prosecutes this appeal.

ASSIGNMENTS OF ERROR

I.

That the District Court erred in finding that the appellee on the 3rd day of March, 1921, and ever since has held and does now hold the license of the United States as master of steam vessels for all oceans and as pilot on Puget Sound and other waters, said license numbered 73609, issue No. 5, 5, the same having been issued for the period of five years from December 2, 1918.

II.

That the District Court erred in finding that the value of the said license to the said appellee at the

time of the commencement of this action and ever since has been and is now more than the sum of $3,000.00.

III.

That the District Court erred in finding that no appeal from the written findings and decision of the Appellants Donald Ames and Harry C. Lord, filed on April 16th, 1921, as affecting said appellee, was ever taken, and that no review of said findings and decision was ever had.

IV.

That the District Court erred in finding that by reason of the findings, conclusion and order of the Appellant William Fisher, mailed to the appellee on July 22d, 1921, and of said William Fisher's threat to enforce said order, the said appellee has been irretrievably damaged and has no plain, speedy and adequate remedy at law in the premises.

V.

That the District Court erred in finding that since March 31st, 1921, neither the said Appellant William Fisher, as said Supervising Inspector, nor the Supervising Inspector General ever acquired jurisdiction over the said appellee or his said license or his right to use and enjoy the same on account or

by reason of the conduct or actions of said appellee as master of said S. S. West Hartland immediately preceding, at, and immediately after the said collision, or on account or by reason of said findings and decision of said Local Board, or at all.

VI.

That the District Court erred in decreeing that the findings, decision and order of the Appellant William Fisher as Supervising Inspector, and the decision and order of the Supervising General affirming the said Appellant William Fisher's said findings, decision and order, are null and void.

VII.

That the District Court erred in perpetually enjoining the said William Fisher as Supervising Inspector from filing with said Local Board his findings, decision and order, or either or any of them, or any decision or order, or any findings, decision or order in any wise reversing, changing or modifying the findings and decision of the said Local Board as to the appellee herein or his license, or from doing anything tending to reverse, modify or change said decision and order of said Local Board as to the said appellee or his said license in the said proceedings.

VIII.

That the District Court erred in perpetually enjoining the Appellants Donald Ames and Harry C. Lord as members of the Local Board, from placing on file with the records of said Local Board or from complying with, recognizing or receiving any findings, decision or order of the said William Fisher as Supervising Inspector, or from the said Supervising Inspector or anyone else tending to modify, change or reverse their said decision as such Local Board as to the appellee herein, and from cancelling or suspending the license of the said appellee on account of his actions or conduct immediately preceding, at, or immediately following the collision.

IX.

That the District Court erred in entering its decree herein in favor of the appellee and against the appellants, for the reason that said decree is not supported or sustained by the testimony adduced at the trial of this cause and the statement of evidence herein.

X.

That the District Court erred in failing to dismiss the bill of complaint herein.

ARGUMENT

Specifications of Error I, III, V, VI, VII, VIII, IX and X raise what we consider the only point in this case, viz.:

> The Jurisdiction of Appellant Fisher as Supervising Inspector of the Eleventh District of Steamboat Inspection Service, Department of Commerce of the United States, to Review the Decision of the Board of Local Inspectors and to Make Findings and Enter a Decision Thereon.

(a) Previous Legislation

The authority for appellant's acts in reviewing said decision of the Board of Local Inspectors and in continuing a hearing before himself and in changing the action of the board is found in an Act of Congress entitled "An Act to Provide for Appeals from Decisions of Boards of Local Inspectors of Vessels, and for other Purposes," approved June 10, 1918; 40 Stat. 602 [Comp. St. §8214 (a) *et seq.*]. Prior to the passage of this act there was no provision for any such review. The act repeals Section 4452 of the Revised Statutes of the United States as amended by Section 6 of the Act of March 3, 1905; 33 Stat. 1028. The orginal Statute Section 4452 R. S. as amended, etc., provides as follows:

"Whenever any board of local inspectors refuses to grant a license to any person applying for the same, or suspends or revokes the license of any master, mate, engineer or pilot, any person deeming himself wronged by such review, suspension or revocation, may, within thirty days thereof, on application to the Supervising Inspector of the District, have his case examined anew by such Supervising Inspector; and the local board shall furnish to the Supervising Inspector in writing the reason for its doings in the premises and such Supervising Inspector shall examine the case anew and he shall have the same power to summon witnesses and compel their attendance and to administer oats that are conferred to local inspectors; and such witnesses shall be paid in the same manner as provided for by the preceding section, and such Supervising Inspector may revoke, change or modify the decision of such local board, and like proceedings may be had by any master or owner of any steam vessel in relation to the inspection of such vessel or her machinery, by any such local board, and in case of repairs, and in any investigation or inspection when there shall be a disagreement between the local inspectors, the Supervising Inspector, when so requested, shall investigate and decide the case. In case of trials for the revocation or suspension of an officer's license, where either the license has been revoked or suspension for more than six months has been made, and such action has

> been affirmed by the Supervising Inspector, the officer whose license is in question may have the case examined anew by the Supervising Inspector General, who shall have the same power to examine witnesses, to compel their attendance and to administer oaths as is conferred on local inspectors, and the Supervising Inspector General may revoke, change or modify said decision. Application for such reexamination of the case shall be made to the Supervising Inspector General within thirty days after final decision by the Supervising Inspector."

In the case of *Joyce v. Bulger*, 240 Fed. 817 (D. C.), it was held that under this section the right to appeal to the Supervising Inspector from the decision of a board of local steamboat inspectors refusing to grant a license or suspend or revoke a license, was given only to an interested party and that an appeal by a stranger to the proceeding was a nullity and conferred no jurisdiction on the Supervising Inspector. This decision indicated a vital defect in the law as it stood prior to the enactment hereinabove referred to by title.

So ineffective was the original law (Sec. 4452 R. S., as amended) that the Secretary of Commerce caused to be drafted the repealing act approved on June 10, 1918, to which we have referred. Prior

to the passage of this act it was referred to the Committee on the Merchant Marine and Fisheries of the House of Representatives, and that committee made its report to the House showing the necessity for a change in the law. This committee report is set forth in defendant's Exhibit "D" (Tr. p. 182). As stated by the committee, the reasons for the enactment of the measure were to be found in certain facts ascertained in the investigation of the Eastland disaster in Chicago in July, 1915. *It developed, the report shows, that in the course of that investigation the action of the local inspectors was final under existing laws with relation to various situations vitally affecting the public interest.* Included in the committee's report is a copy of a letter dated December 21, 1915, from the Honorable William C. Redfield, then Secretary of Commerce, to Representative J. W. Alexander, in which it is pointed out that the hands of the government were tied in a matter where the board of local inspectors had inflicted a wholly inadequate penalty for the violation of the steamship regulations because the old law was inadequate to meet the situation. The committee points out in its report that under certain circumstances where the public interests are vitally affected, the proposed act provides for a review of

the action of the board of local inspectors on the motion of the supervising inspector.

We thus see the defects which the Act of June 10, 1918, was intended to remedy and the purpose it was intended to serve. That Act provides as follows:

> "Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That whenever any person directly interested or affected by any decision or action of any board of local inspectors of vessels shall feel aggrieved by such decision or action, he may appeal therefrom to the supervising inspector of the district; and a like appeal shall be allowed from any decision or action of a Supervising Inspector to the Supervising Inspector-General, whose decision, when approved by the Secretary of Commerce, shall be final; Provided, however, that application for such re-examination of the case by a Supervising Inspector, or by the Supervising Inspector-General, shall be made within thirty days after the decision or action appealed from shall have been rendered or taken.
>
> And, provided further, That in all cases reviewed under the provisions of this act, where the issue is the suspension or revocation of the license of a licensed officer, such officer shall be allowed to be represented by counsel and allowed to testify in his own behalf.
>
> Sec. 2. That whenever there shall be a dis-

agreement between the local inspectors in regard to any matter before them for decision, they shall report the case to the Supervising Inspector of the district who shall investigate and decide the same. Any Supervising Inspector may, within thirty days thereafter, upon his own motion, review any decision or action of any board of local inspectors within his district and in like manner the Supervising Inspector-General may, within thirty days thereafter, review any decision or action of any supervising inspector or board of local inspectors, and the decision of the Supervising Inspector-General in such case, shall, when approved by the Secretary of Commerce, be final.

Sec. 3. That any decision or action reviewed by the Supervising Inspector-General, or by any Supervising Inspector, as provided in Sections 1 and 2 of the act, may be revoked, changed, or modified by such reviewing officer, who shall have power to administer oaths and to summon and compel the attendance of witnesses by a similar process as in the District Courts of the United States; and the disbursing clerk, Department of Commerce, shall pay, on properly certified vouchers, such fees to any witness so summoned for his actual travel and attendance as shall be officially certified to by the officer reviewing the case, not exceeding the rate allowed for fees to witnesses for travel and attendance in the district courts of the United States.

Sec. 4. That the Secretary of Commerce

shall make such regulations as may be necessary to secure a proper enforcement of the provisions of this act.

Sec. 5. That Section Four Thousand Four Hundred Fifty-two of the Revised Statutes, as amended by Section 6 of the Act of March 3, 1905, is hereby repealed."

It will be noted that the Act of June 10, 1918, provides for (1) an appeal by any person directly interested or affected by any decision of a board of local inspectors to the supervising inspector; (2) a like appeal from the decision of the Supervising Inspector to the Supervising Inspector-General under circumstances not provided for under the old law; (3) an investigation by the Supervising Inspector in any case where there shall be a disagreement by the local inspectors; (4) a review by the Supervising Inspector *on his own motion* within thirty days after the decision of the board of local inspectors.

It was pursuant to this latter provision of the new law that the Appellant Fisher as Supervising Inspector acted in the present case.

The new law further provides that any decision or action reviewed by the Supervising Inspector may be revoked, changed or modified by the reviewing officer who is given power by Section 3 of said

enactment to administer oaths and to summon and compel the attendance of witnesses. In this connection it should be borne in mind that no limitation whatsoever is placed by Congress on the nature of the revocation, change or modification of the decision or action of the board of local inspectors that may be made under the act by the Supervising Inspector. The act specifies no particular proceedure governing a review by the Supervising Inspector on his own motion, as distinguished from an appeal to the Supervising Inspector by an interested or affected party under Section 1, and it is appellants' contention that the Supervising Inspector, sitting as a reviewing officer, acts in an administrative capacity and is not hedged about with the formalities and technical rules of proceedure applicable to appeals.

(b) The Supervising Inspector's Right to Review on His Own Motion is Not Controlled By Departmental Rules of Practice Regulating Appeals to the Supervising Inspector.

The fundamental error in the District Court's decision is its holding that the appeal referred to in Section 1 of the Act of June 10, 1918, is for all present purposes synonymous with the right of re-

view given the Supervising Inspector by Section 2 of said act.

A brief analysis of the act brings out the distinction between "review" and "appeal" as there used. Section 1 provides for an appeal by "any person directly interested or affected" by a decision of the board of local inspectors. The jurisdiction there given the Supervising Inspector is clearly appellate and the procedure necessary to evoke that jurisdiction is made formal and specific by the regulations promulgated by the Department of Commerce, which will be referred to hereafter. By Section 2 of the act the Supervising Inspector is given far different powers. He is to act as arbitrator between the inspectors comprising the local board "whenever there shall be a disagreement between the local inspectors in regard to any matter before them for decision." Procedural methods are left entirely to the sound discretion of the Supervising Inspector. His duties as an adjuster of difficulties between the members of the local board are obviously not those of an appellate tribunal. Further, he is given the power to review on his own motion any decision or action of the board of local inspectors within thirty days after the same is rendered. Plainly this does not refer, as the District Court as-

sumed, to a review predicated on appeal. The review is not at the instance of a partisan but at the behest of the reviewing officer himself. Suppose that the decision of the board of local inspectors had been unfavorable to appellee in the first instance and that he had been content to abide by their decision without exercising the privilege of appeal given him under Section 1 of the act. Nevertheless, the Supervising Inspector by his own motion by review would have been empowered to satisfy himself of the justness of the decision below. In making such review he would not have been acting as an appellate tribunal but merely as a reviewing officer empowered by statute to examine into the decisions or actions of inferior officers and to modify the same if need be.

The District Court, going on the assumption that "appeal" and "review" as used in Sections 1 and 2 of the act, respectively, are synonymous terms, fell into the further error of holding that certain regulations promulgated by the Department of Commerce with reference to appeals to Supervising Inspectors were applicable to a review also. The rules referred to were promulgated by the Department of Commerce on May 9, 1921, under the title "Rules of Practice for the Government of Supervis-

ing and Local Inspectors of Steam Vessels in Trials of Licensed Officers of Vessels." Title II of said regulations is under the head "Appeal to Supervising Inspectors," Section 1 thereof, reads as follows:

> "The Supervising inspector, upon notice of an appeal from the decision of the local board, provided said notice of appeal shall be made within thirty days from the date of the decision of the local board, shall give notice in writing to said local board to forward a certified copy of their decision, together with the charges and all evidence in writing on file in their office."

The lower court took the position that "the same procedure applies in effecting appeal by the Supervising Inspector as to an appeal by an interested party and that the same notice must be given to the local board" (referring to notice in writing to be given by the Supervising Inspector under the terms of Section 1 of the regulations, *supra*). In this the court erred. Manifestly the section of the regulations referred to was intended to apply to *appeals* by an *interested party* under Section 1 of the Act of June 10, 1918, and to that alone. The regulation provides that the Supervising Inspector shall "upon notice of appeal" notify the local board to certify up their proceedings. No notice of appeal is required on review of the local board's de-

cision by the Supervising Inspector on his own motion. It was also the requirement of a useless act to compel the Supervising Inspector to notify the local board to send up its decision, charges and evidence, for in this case these documents were immediately sent up by the local board "in the usual way" (Tr. pp. 140 and 142). The local inspectors were charged with this duty by statute regardless of notice by the Supervising Inspector. R. S. §4457 (Comp. Stat. §3219).

(c) The Decision of the Board of Local Inspectors Was One Subject to Review.

The investigation of the local board was for the purpose of ascertaining "whether Captain Alwen was in part responsible for the collision or whether there was any violation under the statutes in regard to navigation for which he was responsible as a licensed officer" (Tr. p. 141). The investigation was concluded by the local board's "findings" absolving appellee from blame. While the local board did not present formal charges against appellee, their "findings" of acquittal as to him came within the scope of "any decision or action" of the local board and as such were subject to review by the Supervising Inspector. In other words, the power of review granted by the act in question to Supervis-

ing Inspectors is not confined to cases where charges have been instituted or are pending before the board of local inspectors.

(d) The Supervising Inspector May Review a Decision of the Board of Local Inspectors in Any Fair and Reasonable Manner.

We have seen that the appellate procedure provided in the regulations has no relation whatever to the powers granted the Supervising Inspector to review on his own motion. Further in this regard, no provision of the Act of June 10, 1918, can be found which attempts to prescribe the procedure for review by a Supervising Inspector. It must therefore, be taken as the intent of Congress to allow the method of review to be determined by the Supervising Inspector himself subject only to the restriction that it be commenced within thirty days from the rendition of the decision.

In the instant case the Appellant Fisher, having received the findings and decision of the local board on April 18, 1921, two days after the decision was rendered, made, on his own motion, a thorough reading and review of the same (Tr. pp. 142 and 143). This review was completed early in May,

Appellant Fisher at that time reaching the conclusion that the action of the local board exonerating appellee was not warranted by the records submitted for review (Tr. p. 144). Appellant Fisher clearly had at the time the power under Section 3 of the Act of June 10, 1918, to "revoke, change or modify" the action of the local board by rendering the decision now complained of, but he very fairly determined to hear further testimony before concluding the issue before him. This he was empowered to do under Section 3 of the act, *supra*. The appellee was, of course, an important witness to be summoned and in the interests of fairness should be permitted to have his own witnesses in attendance. Furthermore, the interests of an orderly proceeding demanded that inasmuch as further testimony was to be heard, the issues should be framed by presenting formal charges against appellee. For these reasons and in order to permit appellee to prepare his own defense beforehand (Tr. p. 144), the summons directed by the Supervising Inspector to appellee specified the particular charges which appellee would be expected to meet (Plaintiff's Exhibit "No. 1," Tr. p. 159). To say that this procedure was an attempt on the part of the Supervising Inspector to prefer "direct charges" against appellee and thus usurp the of-

fice of the local board is to misconstrue the reasons actuating the Supervising Inspector in requesting appellee to appear before him, and to overlook the powers conferred upon the Supervising Inspector by Section 3 of the act to hear additional testimony.

No party to the hearing before the Supervising Inspector seems to have been in doubt that the same was but a continuation of that officer's review of the local board's action in exonerating appellee. Appellee himself testified that he was cognizant of this when he first appeared before Appellant Fisher on May 20, 1921 (Tr. p. 138). It was not until a month later that objection was made by appellee's counsel to the jurisdiction of the Supervising Inspector, and at that time the latter made the following pertinent statement in answer to this objection:

> "In further reference to the objection which was interposed to my instituting these proceedings, I desire to state at this time that the board of local inspectors held an investigation of the collision between the steamships Governor and West Hartland, at the conclusion of which, on April 16, 1921, they rendered a decision exonerating Captain John Alwen of the West Hartland. Pursuant to the Act of 1918, I carefully reviewed their proceedings and concluded that the facts brought out did

> not warrant the conclusion which they reached as to Captain Alwen, and required further investigation on my part, consequently, on May 16, 1921, in accordance with my duties as Supervising Inspector, I preferred charges and under these charges have conducted this hearing as a part of my review of the case. Under Section 3 of the Act of 1918, I have the authority as a reviewing officer to summon witnesses and hear their testimony the same as in an original proceeding." See Defendant's Exhibit "C" (Tr. pp. 178 and 179).

Another ground for the District Court's holding that no proper review was had in this case was the fact that the decision of the Supervising Inspector did not refer to the decision of the local board and that the title of the proceedings before the Supervising Inspector differed from the title of the proceedings before the local board. No statute or regulation is cited requiring this to be done and the defect in this regard, if any, is not substantial and is highly technical.

Nowhere in the Act of June 10, 1918, or the Regulations of the Department of Commerce can anything be found to warrant the conclusion that the method of procedure above outlined was not contemplated by Congress in providing for a review of the local board's decision by the Supervising Inspector,

and it is submitted that the procedure here followed was a just, fair and reasonable exercise of the power conferred upon the Supervising Inspector by Section 2 of the Act of June 10, 1918.

(e) The Act of June 10, 1918, Requires Only That the Review Be Commenced Within 30 Days After the Rendition of the Local Board's Decision.

Some contention was made by counsel, though it was not one of the grounds of the District Court's decision, that the Supervising Inspector's review under Section 2 of the act must have been *concluded* by the expiration of the thirty-day period and that this requisite was jurdisdictional. The act provides, "Any supervising inspector may, within thirty days thereafter * * * review any decision or action of any board of local inspectors." To say that the commencement of the review within the thirty-day period—as happened here—is not a compliance with these provisions is to give them a very strained construction indeed. The result also would work difficulties in the practical application of the act, for by Section 1 thereof, in the case of appeal it is only necessary to make *application* for re-examination within a period of 30 days. In order to relieve this anomalous situation and to give both sections of the

act an harmonious construction in this regard, it is necessary to hold that a commencement of the review within the thirty-day period suffices.

However, it is not here of paramount importance whether the thirty-day limitation be construed to apply to the commencement of the Supervising Inspector's review or to the conclusion thereof. The Appellant Fisher, as reviewing officer, was acting in a *quasi* judicial capacity and any statutory time limitation directed against him in the performance of his functions as such should be construed not as mandatory but as directory merely.

In the case of *McQuillan v. Donahue*, 49 Cal. 157, it appears that an action of ejectment was tried by the court without a jury and submitted and decided orally in favor of the complainant. No decision in writing was ever given or filed. More than five months after the oral decision, defendant moved to place the cause upon the calendar to be tried again. This motion was denied. The court held, in affirming the judgment, that a statute that provided that "upon the trial of a question of fact by the court, its decision must be given in writing and filed with the Clerk thirty days after the cause is given for decision and unless the decision is filed

within that time the action must be tried again" is directory merely.

The Supreme Court of South Dakota, in the case of *Edmonds v. Riley*, 15 S. D. 470; 90 N. W. 139, also held that a statute requiring that "upon the trial of a question of fact by the court its decision must be in writing and filed with the Clerk within thirty days after the cause is submitted for decision" is directory, and failure to file the same within the time limit will not affect the judgment.

To the same effect are the following decisions:

Bruegger v. Cartier, 29 N. D. 72, 126 N. W. 491;

Griffith v. Crommey, 58 S. C. 448, 36 S. E. 738;

McGary v. Steele, 20 Ida. 753, 110 Pac. 448;

Demaras v. Barker, 33 Wash. 200, 74 Pac. 362;

Moyan v. Moyan, 49 Wash. 341, 95 Pac. 271.

It is respectfully submitted that the District Court erred in holding that the Appellant William Fisher as Supervising Inspector did not acquire jurisdiction to review the decision of the board of local inspectors exonerating appellee, and that the procedure followed by Appellant Fisher in review-

ing said decision was contemplated by the provisions of the Act of June 10, 1918.

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